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No. 85-82

In the Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, ET AL., PETITIONERS

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing the grant of summary judgment for petitioners with respect to a claim that their unilateral union activities violated the antitrust laws.

2. Whether the court of appeals erred in reversing the grant of summary judgment for petitioners with respect to a claim that they conspired with nonlabor entities to violate the antitrust laws.

3. Whether the court of appeals erred in permitting one of the respondents to relitigate an adverse finding made in a proceeding before the National Labor Relations Board at which it was the charging party.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are the Building and Construction Trades Council (the Council), an association of building trade unions in the Philadelphia area, and 56 of its member local unions. Respondents are Altemose Construction Company, a nonunion general contractor, and the Chamber of Commerce of the United States, a business association whose members include purchasers of construction services. Respondents filed a two-count complaint in the United States District Court for the Eastern District of Pennsylvania in 1973, alleging that petitioners conspired to eliminate

nonunion contractors and to create a monopoly for union contractors in the greater Philadelphia construction market, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[1] Count I of the complaint alleged that petitioners conspired with unnamed union contractors and other nonlabor entities; Count II alleged only that petitioners conspired among themselves. The complaint sought declaratory and injunctive relief and treble damages in favor of Altemose. Pet. App. 2a-3a,, 10a-11a; C.A. App. 21-44.

The record shows that labor relations in the Philadelphia construction industry are characterized by multi-employer collective bargaining agreements between union subcontractors and local unions. These collective bargaining agreements give union members the right not to work with nonunion laborers. At the general contractor level, the Council has entered into "Building Trades Agreements" with several hundred employers, binding them to do business only with subcontractors that have entered into collective bargaining agreements with the appropriate unions. The approved employers are specified on a list of "fair" subcontractors maintained and distributed by the Council. Petitioners have secured Building Trades Agreements through picketing, violence, and economic pressure. Since 1966, more than 90% of commercial construction in the relevant area has been performed by union contractors. Pet. App. 3a-5a, 22a-26a.

2. Following lengthy discovery proceedings, the district court granted petitioners' motion for summary judgment. Pet. App. 20a-81a. With respect to Count I, the district court concluded that respondents had not produced probative evidence of an actual conspiracy between petitioners

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[1]Another plaintiff, the Associated Builders and Contractors, Inc., an organization of open shop contractors, did not appeal from the district court's grant of summary judgment in petitioners' favor.

and nonlabor entities, such as unionized contractors and developers, suppliers, and financial institutions. *Id.* at 66a-72a. In the absence of direct evidence of such an agreement, the court searched for circumstantial evidence that might support an inference of a conspiracy. The court noted that the Council's purpose of organizing the construction industry is a lawful one, and it found "no evidence in the record to suggest that the unions in seeking the subcontractor agreements tried to protect a select group of union contractors and deny non-union firms the option of becoming union or paying union scale wages." *Id.* at 69a. The court concluded that "[a] jury may not infer a union-employer conspiracy from a union's pursuit of a uniform wage and/or employment policy which indirectly benefits an employer group since the identi[t]y of interests is merely coincidental and not necessarily the product of a conspiracy." *Id.* at 70a.

With respect to Count II, the district court held that petitioners' activities were immune from scrutiny under the antitrust laws on the basis of both the statutory and nonstatutory labor exemptions. See generally *H.A. Artists & Associates, Inc.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 714-716 & n.19 (1981) (discussing labor exemptions). First, the court concluded that, in the absence of an agreement between the Council and Altemose, petitioners were, by virtue of the statutory labor exemption, subject only to the remedies provided in the labor laws. Pet. App. 42a-53a. Second, the court concluded that petitioners' conduct also met the requirements of the nonstatutory labor exemption because it occurred in the context of permissible union organizing activity. *Id.* at 54a-66a. In this regard, the court determined that a decision of the National Labor Relations Board (NLRB) in a proceeding in which Altemose was the charging party collaterally estopped Altemose from contesting the organizational purpose of petitioners' activities for the period between January 20, 1975 and May 1, 1975.

Id. at 57a-58a. As for the remainder of the relevant seven-year period, the district court concluded that the Building Trades Agreements were lawful prehire agreements that sufficiently established a collective bargaining relationship to give rise to exemption from the antitrust laws. *Id.* at 61a-66a.

3. The court of appeals reversed and remanded for trial. Pet. App. 1a-19a. With respect to Count I, the court of appeals relied on its decision in *In re Japanese Electronic Products*, 723 F.2d 238, 303-305 (1983), cert. granted *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp*, No. 83-2004 (argued Nov. 12, 1985), for the applicable standard by which to judge whether respondents' evidence of an antitrust conspiracy was sufficient to withstand summary judgment—"whether a trier of fact could reasonably infer concert of action." Pet. App. 5a. The court of appeals recognized, as had the district court, that the mere fact that the Building Trades Agreements and collective bargaining agreements favored union contractors as well as union members would support only a "highly speculative" inference that the Council had conspired with those contractors to violate the antitrust laws. *Id.* at 9a. Although the circumstantial evidence of concerted activity was "not overwhelming," the court of appeals concluded that evidence that a contractors' association policed its members' use of nonunion subcontractors and that the Council offered to obtain bids from firms on the fair contractors list if Altemose would sign a Building Trades Agreement was "sufficient to support a reasonable inference" of conspiracy. *Id.* at 10a.

With respect to Count II, the court of appeals held that the statutory labor exemption would not shield petitioners from antitrust liability for violations resulting from the Building Trades Agreements because "the Council did not

act unilaterally when it obtained hundreds of [such] agreements from contractors the intent and effect of which was to exclude non-union contractors from the market." Pet. App. 13a. The court also held that the nonstatutory exemption would not support summary judgment because there were disputed issues of fact with respect to whether the Building Trades Agreements were entered into outside the collective bargaining context and whether the Council's own coercive activities had a lawful organizational purpose. *Id.* at 13a-18a. The court of appeals concluded that Altemose was not precluded from relitigating the lawfulness of the Council's actions during the period from January through May 1975 because "Altemose, as the charging party, had no control over the factual or legal issues tried before the [NLRB]." *Id.* at 18.

DISCUSSION

Although we believe that the court of appeals erred to the extent that it ruled that antitrust liability could be premised on concerted conduct involving only unions and their members, in our view prudential considerations counsel against plenary review by the Court at this stage of the proceedings. The case is interlocutory, and the difficult legal questions presented might more appropriately be considered by this Court on review of a final judgment. Moreover, the court of appeals' discussion of the applicability of the statutory labor exemption to the allegations contained in Count II of petitioners' complaint is unclear and the extent of its holding uncertain. Indeed, in significant respects the court of appeals' analysis is sound and would independently support its reinstatement of Count II insofar as the court of appeals, in fact, correctly interpreted the allegations in that count. Thus, the court of appeals' judgment may rest on an alternative ground, one that does not appear to be challenged by petitioners. The court of appeals may, however, have misunderstood the allegations contained in Count II, an error that may subsequently be

rectified and could at this stage introduce confusion into this Court's consideration of the issues. Finally, the court of appeals' reversal of summary judgment with respect to Count I of the complaint rests on its application of an evidentiary standard that is currently under consideration by the Court in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004. It would therefore be appropriate for the Court to hold this petition for disposition in light of the decision in that case.

1. Petitioners contend (Pet. 12-18) that the court of appeals erred in holding that the statutory labor exemption from the antitrust laws does not support summary judgment in their favor on Count II of the complaint, which did not allege a conspiracy between petitioners and nonlabor entities. Although the court of appeals' reasoning is far from clear, we agree with petitioners that the court of appeals erroneously concluded that their unilateral union activity is not entitled to the benefit of the statutory labor exemption. Nonetheless, we do not believe that review by this Court is warranted at this stage of the proceedings.

a. The court of appeals began its analysis of Count II by correctly observing that the statutory labor exemption[2] is unavailable to the extent that respondents alleged "concerted action or agreements between [petitioners] and nonlabor parties having effects outside the * * * collective bargaining relationship." Pet. App. 12a; see *H.A. Artists & Associates, Inc.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 714-715 (1981); *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-622 (1975); *United States* v. *Hutcheson*, 312 U.S. 219, 232

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[2]The sources of the statutory exemption are Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17, 29 U.S.C. 52, and Sections 4, 5, and 13 of the Norris-LaGuardia Act, 29 U.S.C. 104, 105, 113.

(1941). The court of appeals therefore determined that petitioners' Building Trades Agreements, entered into with general contractors, could not enjoy statutory immunity from antitrust scrutiny. Pet. App. 12a-13a. This aspect of the court of appeals' reasoning undoubtedly represents a proper application of the governing precedents, and it does not appear to be challenged by petitioners.

Nor do petitioners appear to dispute that the court of appeals correctly determined that the nonstatutory labor exemption is inapplicable to these agreements, at least to the extent that the agreements were "entered into outside the collective bargaining context." Pet. App. 16a. Indeed, this portion of the court of appeals' opinion represents a straightforward and conceptually sound application of the decision in *Connell*, which similarly involved agreements between construction unions and general contractors obligating those contractors to do business only with unionized subcontractors.[3] The district court may have been correct that the agreements here, unlike those in *Connell*, are consistent with the federal labor laws because they were entered into in the context of legitimate union efforts to organize the general contractors' employees. Compare Pet. App. 54a-66a with 421 U.S. at 619, 626-635. On the other hand, this issue arguably involves a disputed issue of fact that should not have been resolved on summary judgment. See Altemose Br. in Opp. 3; Chamber of Commerce Mem. 5. In any event, such a factbound question does not merit review by this Court, especially at this interlocutory stage of the proceedings.

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[3]We agree with the court of appeals (Pet. App. 12a-13a, 16a-17a) that *Connell* is applicable even though Altemose did not itself enter into a Building Trades Agreement with the Council. That factual difference between this case and *Connell* is not material: there is no reason to make the exemption depend on the identity and circumstances of the plaintiff, factors that are relevant to the plaintiff's standing and injury, not to the defendants' immunity.

Accordingly, to the extent that Count II rests on allegations concerning the anticompetitive effects of petitioners' Building Trades Agreements, the court of appeals appears to have been correct in reversing the grant of summary judgment, wholly apart from its analysis of petitioners' unilateral conduct, the aspect of the opinion with which petitioners primarily take issue. We are unsure, however, of the extent to which Count II is properly read to allege violations resulting from these Agreements. That count does not allege a conspiracy between petitioners and contractors, and appears instead to rest primarily, if not exclusively, on unilateral union activity distinct from the Agreements. See C.A. App. 40-42. Accordingly, it may be that the court of appeals misinterpreted this aspect of the complaint. That is a matter that should be clarified in further proceedings in the case and is not now in a posture warranting consideration by this Court.

b. Although it is difficult to discern from the court of appeals' opinion, it appears that the court erroneously failed to accord petitioners' unilateral union activities the statutory exemption to which they are entitled. In particular, the court of appeals stated that petitioners' "coercive concerted activities *aimed at obtaining* [Building Trades Agreements] remain subject to antitrust scrutiny under the Sherman Act." Pet. App. 16a (emphasis added). Regardless of whether those agreements would themselves be subject to antitrust scrutiny under *Connell*, however, we think it clear that petitioners' own coercive activities (such as picketing), not engaged in pursuant to a conspiracy with nonlabor entities, and directed toward persuading Altemose and other general contractors to enter into the agreements, are entitled to the statutory exemption.

To the extent that petitioners acted unilaterally and in pursuit of their own self-interest, it matters not whether their conduct was lawful or unlawful. This much has been

clear since *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 483-484, 513 (1940), and *United States* v. *Hutcheson, supra*. As the Court stated in *Hutcheson* (312 U.S. at 232 (footnote omitted)):

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act, 29 U.S.C. 52] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Subsequent developments have in no sense cast doubt on this rule; to the contrary, it was reaffirmed as recently as 1981 in *H.A. Artists & Associates*, 451 U.S. at 715. See also *Connell*, 421 U.S. at 621-622. Here, there is no doubt that petitioners' unilateral coercive activities were related to their self-interest in organizing the construction industry. The facts that the Building Trades Agreements may themselves have been unlawful or that petitioners may not have been attempting to organize Altemose's own employees are, under *Hutcheson*, simply irrelevant.[4] It is the labor laws, rather than the antitrust laws, that provide the governing legal standards and the appropriate remedies.

While the court of appeals erred in this respect, we do not believe that its decision warrants plenary review in light of the interlocutory nature of the proceedings and the considerations already discussed with respect to other aspects of

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[4]See also Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. 113(c) (emphasis added) (defining "labor dispute" as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating * * * or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*").

the court of appeals' decision concerning Count II. We note as well that the court of appeals' discussion is far from pellucid, in part because it never directly addressed the applicability of the statutory exemption to petitioners' unilateral conduct in the section of its opinion purporting to deal with that exemption. See Pet. App. 11a-13a. Rather, the court's error may be discerned only through its unexplained failure to apply the statutory exemption to coercive activity that it subsequently expressly determined was unprotected by the nonstatutory exemption. See *id.* at 16a-17a. In these circumstances, we believe that review by this Court should await further consideration of the issues below in the context of the further factual development that will take place on remand.

2. Petitioners argue next (Pet. 18-24) that the court of appeals erroneously reversed the grant of summary judgment with respect to Count I of the complaint merely because a conspiracy between unions and unionized contractors "could be inferred" (Pet. App. 10a) from circumstantial evidence adduced by respondents. Although the court of appeals did not discuss the appropriate standard in detail, it did state that it was relying on its decision in *In re Japanese Electronic Products*, 723 F.2d 238 (1983), which is currently under submission before this Court *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.* No. 83-2004 (argued Nov. 12, 1985).

In our brief as amicus curiae supporting petitioners in *Matsushita*,[5] we urged that the court of appeals failed to apply the test enunciated by this Court in *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968), which requires that an antitrust plaintiff who seeks to prove the existence of an anticompetitive conspiracy on the basis of

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[5]We are serving copies of that brief on counsel in this case.

circumstantial evidence in the form of parallel conduct can defeat summary judgment only by showing that the evidence is more consistent with the inference that the conduct resulted from the alleged conspiracy than with the inference that it resulted from independent action. Although the matter is not free of doubt, the court of appeals may have committed the same error here, as suggested by its failure to cite *Cities Service* or to refer to the standard established in that case and its conclusions that respondents' evidence was "not overwhelming" and that the evidence would merely "support a reasonable inference" of concerted action. Pet. App. 10a.[6] Accordingly, we believe that it would be appropriate to hold the petition pending the Court's decision in *Matsushita* and then to dispose of the petition as appropriate in light of that decision.

3. Finally, petitioners urge (Pet. 24-27) that the Court should grant the petition to resolve a conflict among the circuits with respect to whether the charging party in a proceeding before the National Labor Relations Board may be collaterally estopped in subsequent judicial proceedings on the basis of an adverse finding by the Board. Compare Pet. App. 18a (not applying collateral estoppel) with *Frye* v. *United Steelworkers*, 767 F.2d 1216 (7th Cir. 1985) (applying collateral estoppel); *International Ass'n of Machinists* v. *Nix*, 512 F.2d 125, 131-132 (5th Cir. 1975) (same); *International Wire* v. *Local 38, IBEW*, 475 F.2d 1078 (6th Cir. 1973) (same), aff'g per curiam 357 F. Supp. 1018, 1025

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[6]On the other hand, the court of appeals' emphasis on whether the union contractors' conduct was prima facie consistent with their economic self-interest (Pet. App. 10a) does reflect the proper inquiry, for conduct at odds with the employers' individual economic interest is more consistent with concerted anticompetitive activity than with independent competitive action. See *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462-466 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

(N.D. Ohio 1972), cert. denied, 414 U.S. 867 (1973).[7] The court of appeals' judgment, however, does not actually depend on this ruling. The NLRB's finding covered only five months of an alleged seven-year conspiracy and could bind only one of the two remaining plaintiffs in this litigation. Moreover, the court of appeals' reinstatement of Count II appears to rest on its discussion of the Building Trades Agreements, wholly apart from the coercive activities to which its collateral estoppel discussion is relevant. See pages 6-8, *supra*. Accordingly, review by this Court is not warranted. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

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[7]We note that in the cited decisions permitting collateral estoppel of a charging party, the courts do not appear to have discussed the objection raised by the court of appeals in this case, *i.e.*, that a charging party should not be collaterally estopped because he is not in control of the litigation before the Board and therefore does not have a full and fair opportunity to litigate an issue in that proceeding.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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